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June 11, 2019

The Honourable Mr. Justice D.B. Nixon
Court of Queen's Bench of Alberta
Calgary Courts Centre
601-5 Street SW
Calgary, AB T2P 5P7

My Lord:

Re: Re: PricewaterhouseCoopers Inc., LIT v. Perpetual Energy Inc., et al
Court File No. 1801-10960

In response to your letter of May 23, 2019 to counsel and the Joint Submissions of the Defendants under cover of Mr. Leitl's letter of June 4, 2019, I attach the further submissions on behalf of the Trustee regarding the *Redwater* and *Weir-Jones* decisions.

Sincerely,

DE WAAL LAW

Rinus de Waal

Enclosure

cc: Daniel J. McDonald, Q.C.
Steve Leitl

	CLERK'S STAMP
COURT FILE NUMBER	1801-10960
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFF	PRICEWATERHOUSECOOPERS INC., LIT, in its capacity as the TRUSTEE IN BANKRUPTCY OF SEQUOIA RESOURCES CORP. and not in its personal capacity
DEFENDANTS	PERPETUAL ENERGY INC., PERPETUAL OPERATING TRUST, PERPETUAL OPERATING CORP., and SUSAN RIDDELL ROSE
DOCUMENT	**FURTHER SUBMISSIONS OF THE RESPONDENT PRICEWATERHOUSECOOPERS INC., LIT**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PERSON FILING THIS DOCUMENT

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Counsel for the Respondent

1. The decisions in *Redwater* and *Weir-Jones* do not change the position of the Trustee with respect to the "Stay Applications" or the "Summary Dismissal and Striking Applications" of the Defendants on any of the seven issues defined in the Trustee's Brief for the hearing on November 8, 2018 (the "**Trustee's Brief**").

2. In fact, both decisions are consistent with the submissions of the Trustee in its Brief and in its written responses to the Court's questions.

The *Redwater* decision

3. The Perpetual Defendants had argued that the Trustee could only bring an oppression claim on behalf of creditors of PEOC and that PEOC had no creditors on closing.[1] The same argument was presented on behalf of Rose.[2]

   3.1. The Trustee responded to these submissions in paragraphs 106 to 131 of the Trustee's Brief.[3] On the Defendants' own evidence, three municipalities have provable claims against PEOC in the total amount of at least $1,560,809 at the time of the Asset Transaction on October 1, 2016.[4]

   3.2. Although the municipalities' claims were sufficient to dispose of the Defendants' argument that the Trustee lacked standing to seek relief from oppression, the Trustee addressed the AER's status as a creditor based on the law at the time, as reflected in the Court of Appeal's reasons in *Redwater*.[5]

4. In its written responses to the Court's questions, the Trustee specifically confirmed that the expected Supreme Court decision in *Redwater* would have no effect on its standing to advance a claim for oppression:

   > c. *The concept of a "provable claim" is not relevant to the Court's oppression analysis.* As we have pointed out, even plaintiffs who were, at best, potential judgment creditors, have been recognized by the Courts as

[1] Perpetual Brief, para. 77(c).
[2] Rose Brief, paras. 100(b), 122.
[3] Trustee's Brief, at paras. 106-131.
[4] Trustee's Brief, at paras. 109-116.
[5] Trustee's Brief, at paras. 117-131.

> proper "complainants" for the purposes of oppression claims (*Apotex*, para. 39, *Downtown Eatery*, para. 61 (Trustee's Authorities, Tab 24), *Gestion-Trans-Tek*, para. 28 (Rose, Tab 44)[6] [Emphasis added.]
>
> [...]
>
> *As discussed in response to the question in paragraph 19 above, the "provable claim" issue is a red herring*: it is a *BIA* definition not relevant to the Court's oppression analysis under s. 242 of the *ABCA*.
>
> a. ...
>
> b. *It is not necessary for the Trustee to establish that the AER's claims satisfy the three-part test in AbitibiBowater in order to pursue its oppression claim.* As in *Apotex*, *Downtown Eatery* and *Gestion Trans-Tek*, even a potential creditor at the time of the oppressive conduct can seek relief from oppression. [Emphasis added.]
>
> c. It is not necessary for the Court to determine whether the AER had a provable claim at the time of the Asset Transaction.[7]

5. In their additional submissions, the Defendants acknowledge that a complainant seeking relief from oppression need not establish that it has a provable claim under the *BIA*.[8] However, they argue that:

   5.1. "oppression cases require that the claimant must be an actual or contingent creditor at the time of the Transaction";[9] and that

   5.2. The Court in *Redwater* confirmed "as a matter of law, the AER is not a creditor in respect of licensee's ARO".[10]

6. The first submission is incorrect: s. 239(b)(iii) and (iv) of the *ABCA* confirm that "complainant" is not limited to a "creditor" and can be "any other person who, in the discretion of the Court, is a proper person to make an application" under Part 19.[11]

7. With respect to the second submission:

   7.1. The Court in *Redwater* addressed only the question of whether the AER was a "creditor" within the meaning of the *BIA*, meaning a creditor with a provable

[6] Trustee's Response to Question in Paragraph 19, part (c).
[7] Trustee's Response to Question in Paragraph 21.
[8] Defendants' Additional Submissions, at para. 21.
[9] Defendants' Additional Submissions, at para. 21.
[10] Defendants' Additional Submissions, at para. 22.
[11] *Business Corporations Act*, s. 239(b)(iii) and (iv).

claim satisfying the *Abitibi* test. The Court did not address the broader question of whether the AER was a creditor for any purpose, including a creditor oppression claim.

7.2. The Court in *Redwater* was also not required to address the possibility that the AER could advance an oppression claim as a non-creditor stakeholder. As the Supreme Court noted in *Peoples*, and reaffirmed in *BCE*, the list of stakeholders affected by corporate decision-making includes "governments and the environment".[12]

8. In their additional submission, the Defendants also assert that the Court in *Redwater* held that ARO is "not a liability",[13] citing paragraph 157:

> In *Redwater*, the Supreme Court held that, *rather than being a form of liability*, the "end-of-life obligations form a fundamental part of the *value* of the licenced assets, the same as if the associated costs had been paid up front."[14]
>
> [Emphasis added]

9. Proceeding from the (incorrect) premise that "*Redwater* holds that the ARO was not a liability",[15] the Defendants argue that:

9.1. The premise of the Trustee's claims against Rose is that Rose "failed to consider the implications of PEOC's ARO as a liability of PEOC";[16] and

9.2. As a result, the "entire premise of the Trustee's claim against Rose in this regard is extinguished by *Redwater*".[17]

10. The *Redwater* decision, in particular paragraph 157 relied on by the Defendants, confirms that these arguments are without merit.

> All licenses held by Redwater were received by it subject to the end-of-life obligations that would one day arise. These end-of-life obligations form a

[12] BCE Inc. v. 1976 Debentureholders, 2008 SCC 69, at para. 39, citing Peoples Department Stores Inc. (Trustee of) v. Wise, 2004 SCC 68, at para. 42.
[13] Defendants' Additional Submissions, at heading "D".
[14] Defendants' Additional Submissions, at para. 15.
[15] Defendants' Additional Submissions, at para. 26.
[16] Defendants' Additional Submissions, at para. 25.
[17] Defendants' Additional Submissions, at para. 27.

> fundamental part of the value of the licensed assets, the same as if the associated costs had been paid up front. Having received the benefit of the Renounced Assets during the productive period of their life cycles, Redwater cannot now avoid *the associated liabilities*.[18]
>
> [Emphasis added.]

11. The reference in *Redwater* to ARO as "associated liabilities" is consistent with the Supreme Court's analysis in *Daishowa*. The issue in *Daishowa* was whether, from an income tax perspective, the $11 million in reforestation obligations assumed by the purchaser depressed the value of the tenures sold, reducing the proceeds of disposition to the value of the tenures net of the obligations, or was *separate* liability to be included in the seller's proceeds of disposition for tax purposes.[19]

12. The Court held that:

    12.1. assumption of the reforestation obligations did not form "an additional part of the sale price" for tax purposes;[20] and that,

    12.2. unlike a mortgage, the reforestation obligations were not a "distinct existing debt" or a "liability that can be separated from the forest tenure", such that they had to be added to the seller's proceeds of disposition.

    However, as in *Redwater*, there is no dispute in *Daishowa* that the reforestation obligations were a form of liability: the Court, for example, uses the terms "reforestation liabilities" and "reforestation obligations" interchangeably in framing the issues.[21]

13. Accordingly, there is no merit to the Defendants' submissions that "*Redwater* holds that the ARO was not a liability" and that this somehow "extinguished" the Trustee's claims against Ms. Rose relating to the ARO assumed by PEOC.[22]

14. In fact, the decision in *Redwater* confirms, as previously submitted by the Trustee:[23]

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[18] Redwater, supra, at para. 157.
[19] Daishowa, supra, at paras. 6, 7, 20.
[20] *Ibid*, at paras. 28-29.
[21] *Ibid*, at para. 21.
[22] Defendants' Additional Submissions, at paras. 26-27.
[23] Trustee's Answers to Question in Paragraphs 5(c) and 40.

14.1. that the analysis in *Daishowa* applies to ARO; and

14.2. that the ARO associated with the assets transferred to PEOC had a present effect on the fair market value of those assets, "the same as if the associated costs had been paid up front."[24]

The *Weir-Jones* decision

15. This decision is consistent with the Trustee's submissions in paragraphs 29 to 37 – that the law does not support the Defendants' Stay Applications.

16. In *Weir-Jones*, the Court of Appeal clarified the law applicable to applications for summary disposition.[25] It described the "rift" in the case law regarding the test for summary judgment in Alberta, exemplified by its prior decisions in *Can v. Calgary Police Service* and *Stefanyk v. Sobeys Capital Incorporated*:[26]

16.1. In *Can*, the Court held that "summary judgment is appropriate if the non-moving party's position is without merit", meaning that the "facts and law make the moving party's case unassailable".

16.2. In *Stefanyk*, the Court held that the "ultimate issue is whether the appellant has proven on a balance of probabilities that it is not liable for the plaintiff's injuries."[27]

17. With respect to the principles of summary judgment, the Court emphasized that summary disposition, not trial, should now be the default method for determining claims:

> If the record allows the judge to make the necessary findings of fact and apply the law, *then summary procedure should be used unless* there is a substantive reason to conclude that summary disposition would not "achieve a just result". Presuming that summary disposition will always be "unjust" unless it meets

[24] Redwater, supra, at para. 157.
[25] *Weir-Jones Technical Services Incorporated v. Purolator Courier Ltd.*, 2019 ABCA 49 (*Weir-Jones*), at para. 13 referring to *Brookfield Residential (Alberta) LP v. Imperial Oil Limited*, 2019 ABCA 35 (*Brookfield*).
[26] *Ibid*, at para. 12, citing *Can v. Calgary Police Service*, 2014 ABCA 322 (*Can*)and *Stefanyk v. Sobeys Capital Incorporated*, 2018 ABCA 124 (*Stefanyk*)
[27] *Ibid.*

> some high standard of irrefutability *defeats the whole concept of the "culture shift" mandated by Hyrniak v. Mauldin.*[28]
>
> [Emphasis added.]

18. With respect to the "principles of proof" applicable in applications for summary disposition:

    18.1. The Court confirmed that there is only one standard of proof used in civil law: proof on a balance of probabilities. However, the standard of proof only applies to findings of fact, not to the discretionary decision to grant a summary disposition.[29]

    18.2. There is no "symmetry of burdens" in an application for summary disposition. The party moving for summary judgment must prove the factual elements of its case on a balance of probabilities, "no defence" if it is the plaintiff and "no merit" if it is the defendant.[30] The burden of proof remains on the applicant to show that the test for summary disposition has been met.[31]

19. With respect to the principles relating to the record in summary dispositions, the Court stated that:

> An important thing to observe about this part of the test is that it assumes that the summary judgment judge (or Master) *is able to make findings of fact. The judge is entitled, where possible, to make those findings from the record and draw the necessary inferences.* The parameters on fact finding are discussed, infra, para. 38. *Summary judgment is not limited to cases where the facts are not in dispute.* If the summary judgment judge is not able to make the necessary findings of fact, that is an indication that there is a "genuine issue requiring a trial". This issue is discussed, infra, paras. 27ff.[32] [Emphasis added.]

20. The Court confirmed that, where possible, "findings of fact can and should be made on a summary disposition application."

> The law is now clear that the mere presence of some conflicting evidence on the record does not preclude summary disposition. As pointed out in *Hyrniak v.*

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[28] *Ibid*, at para. 25.
[29] *Ibid*, at paras. 27-29.
[30] *Ibid*, at paras. 32-34.
[31] *Ibid*, at para. 35.
[32] *Ibid*, at para. 21.

> *Mauldin* at para. 48, summary judgment is not limited to cases based on documentary evidence, or where the facts are essentially admitted.[33]

21. A party responding to an application for summary disposition is also required to put its "best foot forward", unless one party effectively controls all of the records and evidence with respect to the claim.[34] The determination of whether the Court can make the necessary findings of fact should be based on the evidence actually before the Court, not mere speculation.[35]

22. Finally, with respect to the "principles of fairness", the Court emphasized that "fairness is a two-way street" and a plaintiff's "right to go to trial" had to be balanced against the "right of the defendant not to have a trial on an unmeritorious claim".[36] The Court pointed out that "cost, delay and inequality of arms" may mean that "the right adjudicative fairness can actually be hindered by a full trial."[37]

23. In paragraphs 29 to 37 of its brief, the Trustee relied on *Stefanyk* and *Angus Partnership* in submitting that the Defendants' stay application is inconsistent with the current law on the summary disposition of claims.[38]

24. The clarification provided by the Court of Appeal in *Weir-Jones* provides additional support for the Trustee's submissions:

    24.1. Following the "culture shift" mandated by *Hyrniak*, summary disposition is the default method for determining claims. It "should be used" unless there is a "substantive reason" to conclude that it would not achieve a "just result".[39]

    24.2. Where possible, the Court "can and should" make findings of fact on a summary disposition application.[40] The mere existence of conflicting evidence on the record is not a basis for refusing summary disposition.[41]

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[33] *Ibid*, at para. 36.
[34] *Ibid*, at paras. 37 and 40.
[35] *Ibid*, at para. 39.
[36] *Ibid*, at paras. 42-43.
[37] *Ibid*, at para. 43.
[38] Trustee's Brief, at paras. 29 to 37.
[39] *Weir-Jones*, at para. 25.
[40] *Ibid*, at para. 36.

24.3. A party is required to put its "best foot forward" and any determination that a trial is required must be based "on the evidence before the summary disposition judge, not mere speculation."[42]

24.4. Fairness is a "two-way street" requiring that the rights of the party seeking a trial must be balanced against the rights of the party seeking to avoid an unnecessary trial. "Cost, delay and inequality of arms may mean that the right to adjudicative fairness, justice and reliability can actually be hindered by a full trial".[43]

25. Per *Weir-Jones*, the Trustee's claims against the Defendants should be determined summarily unless there is a "substantive reason" to conclude it would lead to an "unjust result".[44]

26. As the Trustee submitted in its brief, it is insufficient for the Defendants merely to assert that they *will* "require factual and expert evidence",[45] particularly when the claims against them were articulated in May 2018 and are based *on their own information.*[46]

27. With the exception of the statement in paragraph 32 that the *Weir-Jones* decision is "entirely supportive of the Defendants' positions on their summary dismissal applications", the Trustee does not take issue with the Defendants' submissions regarding the decision. There is no "substantive reason" to depart from summary disposition as the default method for determining the issues raised.[47]

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[41] *Ibid.*
[42] *Ibid*, at para. 39.
[43] *Ibid*, at para. 43.
[44] *Ibid.*
[45] *Weir-Jones*, at para. 39.
[46] Trustee's Brief, at para. 37.
[47] Weir-Jones, supra, at para. 25.